

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DIANA L.,

Plaintiff,

V.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

Case No. C23-5019-SKV

ORDER REVERSING THE COMMISSIONER'S DECISION

Plaintiff seeks review of the denial of her application for Disability Insurance Benefits.

Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court **REVERSES** the Commissioner's final decision and **REMANDS** the matter for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

BACKGROUND

Plaintiff was born in 1969, has a high school diploma and two years of community college education, and has worked as a graphic designer. AR 137, 288. Plaintiff was last gainfully employed in November 2016. AR 287.

In March 2020, Plaintiff applied for benefits, alleging disability as of November 25, 2016. AR 276-77. Plaintiff's application was denied initially and on reconsideration, and

1 Plaintiff requested a hearing. AR 194-97, 199-201, 208-09. After the ALJ conducted a hearing
2 in July 2021 (AR 131-61), the ALJ issued a decision finding Plaintiff not disabled. AR 16-36.

3 **THE ALJ'S DECISION**

4 Utilizing the five-step disability evaluation process,¹ the ALJ found:

5 **Step one:** Plaintiff has not engaged in substantial gainful activity since the alleged onset
date.

6 **Step two:** Plaintiff has the following severe impairments: congestive heart failure,
7 cardiomyopathy, fibromyalgia, chronic fatigue syndrome, chronic headache, moderate
tricuspid regurgitation/severe mitral regurgitation, and anxiety.

8 **Step three:** These impairments do not meet or equal the requirements of a listed
9 impairment.²

10 **Residual Functional Capacity (RFC):** Plaintiff can perform light work with additional
11 limitations: she must avoid unprotected heights and industrial machinery. She must
12 avoid climbing ladders and scaffolds, but can frequently climb ramps and stairs. She can
13 tolerate occasional exposure to temperature extremes, humidity, and environmental
irritants, such as dust, fumes, odors, and gases. She should avoid work environments
with a noise level above 3 (as defined in the Dictionary of Occupational Titles). She can
have only incidental public contact. She can occasionally reach, and frequently push and
pull, with her right arm.

14 **Step four:** Plaintiff cannot perform past relevant work.

15 **Step five:** As there are jobs that exist in significant numbers in the national economy that
16 Plaintiff can perform, Plaintiff is not disabled.

17 AR 16-36.

18 The Appeals Council denied Plaintiff's request for review, making the ALJ's decision the
19 Commissioner's final decision. AR 1-7. Plaintiff appealed the final decision of the
20 Commissioner to this Court. Dkt. 1.

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¹ 20 C.F.R. §§ 404.1520, 416.920.

² 20 C.F.R. Part 404, Subpart P, App. 1.

LEGAL STANDARDS

Under 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s denial of social security benefits when the ALJ’s findings are based on harmful legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005). As a general principle, an ALJ’s error may be deemed harmless where it is “inconsequential to the ultimate nondisability determination.” *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012) (cited sources omitted). The Court looks to “the record as a whole to determine whether the error alters the outcome of the case.” *Id.*

Substantial evidence is “more than a mere scintilla. It means - and means only - such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (cleaned up); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for evaluating symptom testimony, resolving conflicts in medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to more than one rational interpretation, it is the Commissioner’s conclusion that must be upheld. *Id.*

DISCUSSION

Plaintiff argues the ALJ erred in: (1) finding at step three that she does meet or equal Listing 4.02,³ (2) discounting her subjective testimony, (3) assessing certain medical opinions,

³ Although the assignment of error listed on the first page of Plaintiff's opening brief references Listing 1.04, this appears to be an oversight because the section of the brief addressing this issue discusses only Listing 4.02. *Compare* Dkt. 7 at 1 with Dkt. 7 at 9.

1 (4) assessing her RFC, and (5) failing to address Plaintiff's request to cross-examine the State
 2 agency medical consultants. The Commissioner argues the ALJ's decision is free of harmful
 3 legal error, supported by substantial evidence, and should be affirmed.

4 **A. The ALJ Did Not Err at Step Three**

5 At step three, the ALJ considers whether one or more of a claimant's impairments meet
 6 or medically equal an impairment listed in Appendix 1 to Subpart P of the regulations. "The
 7 listings define impairments that would prevent an adult, regardless of his age, education, or work
 8 experience, from performing *any* gainful activity, not just 'substantial gainful activity.'"

9 *Sullivan v. Zebley*, 493 U.S. 521, 532 (1990) (citations omitted).

10 Plaintiff bears the burden of proof at step three. *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5
 11 (1987). A mere diagnosis does not suffice to establish disability. *Key v. Heckler*, 754 F.2d 1545,
 12 1549-50 (9th Cir. 1985). "[An impairment] must also have the *findings* shown in the Listing of
 13 that impairment." *Id.* at 1549-50 (quoting § 404.1525(d); emphasis added in *Key*). To meet a
 14 listing, an impairment "must meet *all* of the specified medical criteria." *Sullivan*, 493 U.S. at
 15 530. "To equal a listed impairment, a claimant must establish symptoms, signs and laboratory
 16 findings 'at least equal in severity and duration' to the characteristics of a relevant listed
 17 impairment[.]" *Tackett v. Apfel*, 180 F.3d 1094, 1099 (9th Cir. 1999); § 416.926 (a).

18 In this case, the ALJ found that Plaintiff's heart failure did not meet or equal the
 19 requirements of Listing 4.02 (chronic heart failure) because the record does not contain "the
 20 requisite documentary objective medical evidence of coronary deterioration" as required by that
 21 Listing. AR 20. Listing 4.02 has two sections (A and B), and in order to satisfy this Listing the
 22 claimant must satisfy both sections. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 4.02.

1 The parties do not appear to dispute that Plaintiff satisfies the A criteria (Dkt. 12 at 7-8,
 2 Dkt. 13 at 6), but they disagree as to the B criteria, which require that a claimant has: (1)
 3 persistent symptoms of heart failure which very seriously limit the ability to independently
 4 initiate, sustain, or complete activities of daily living in an individual for whom a medical
 5 consultant has concluded that the performance of an exercise test would present a significant
 6 risk; (2) three or more episodes of acute congestive heart failure; or (3) inability to perform an
 7 exercise tolerance test at a workload equivalent to 5 METs or less due to one of four
 8 circumstances not at issue in this case. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 4.02(B).

9 In her opening brief, Plaintiff contends that a physician's opinion that Plaintiff is "in a
 10 severe heart failure state and I do not expect improvement" satisfies Listing 4.02(B). Dkt. 7 at 9
 11 (citing AR 927). The Court agrees with the Commissioner (Dkt. 12 at 7-8) that this statement
 12 does not satisfy Listing 4.02(B) because it does not address any of the specific findings required
 13 in that section. *See* AR 927.

14 In her reply brief (Dkt. 13 at 6-7), Plaintiff cites different evidence to support her
 15 argument that the record satisfies Listing 4.02(B), but the evidence cited there is also deficient
 16 because although it references some of the parts of Listing 4.02(B)(1), it does not indicate that an
 17 exercise test would pose a significant risk to Plaintiff. *See* AR 814.

18 Because Plaintiff has not identified evidence that meets or equals *all* of the requisite parts
 19 of Listing 4.02(B), she has failed to establish that the ALJ harmfully erred in finding that she
 20 does not meet or equal Listing 4.02.

21 **B. The ALJ Erred in Discounting Plaintiff's Physical Allegations**

22 The ALJ summarized Plaintiff's allegations and the medical record and found that the
 23 clinical findings "are equivocal at best and do not support the claimant's alleged loss of

1 functioning and symptom severity.” AR 30. The ALJ noted that Plaintiff’s headaches, chronic
 2 pain, and fibromyalgia were treated conservatively, and that she did not treat her alleged mental
 3 symptoms and reported that her symptoms were alleviated with medication. *Id.* The ALJ
 4 acknowledged Plaintiff’s “fatigue and cardiac issues and complications” and related treatment,
 5 but stated that “improvement is noted.” *Id.* The ALJ also noted that despite Plaintiff’s
 6 conditions, she was nonetheless able to complete a range of daily activities. AR 34.

7 Absent evidence of malingering, an ALJ must provide clear and convincing reasons to
 8 discount a claimant’s subjective allegations. *See Burrell v. Colvin*, 775 F.3d 1133, 1136-37 (9th
 9 Cir. 2014). “General findings are insufficient; rather, the ALJ must identify what testimony is
 10 not credible and what evidence undermines the claimant’s complaints.” *Lester v. Chater*, 81
 11 F.3d 821, 834 (9th Cir. 1996).

12 Plaintiff contends that the ALJ failed to provide clear and convincing reasons to discount
 13 her allegations. The Court disagrees as to Plaintiff’s mental allegations. The ALJ did not err in
 14 discounting Plaintiff’s mental allegations due to lack of treatment and reported alleviation of
 15 symptoms with medication. Although Plaintiff argues that she should not be penalized for
 16 exercising poor judgment in failing to treat her mental conditions (Dkt. 7 at 13), the record
 17 indicates that Plaintiff reported improvement with medication to the point that Plaintiff denied
 18 experiencing anxiety altogether. *See* AR 537. The ALJ did not err in considering Plaintiff’s
 19 course of treatment when assessing her mental allegations, and her improvement with minimal
 20 treatment is a clear and convincing reason to discount those allegations. *See* 20 C.F.R. §
 21 404.1529(c)(3)(iv)-(v).

22 But the ALJ’s reasons for discounting Plaintiff’s physical allegations do not pass muster.
 23 The ALJ erred in suggesting that Plaintiff’s conservative course of treatment for headaches,

1 chronic pain, and fibromyalgia undermined her testimony about the severity of her symptoms
 2 related to those conditions, given that there is no indication in the record or in the ALJ's decision
 3 that more aggressive treatment exists for these conditions. *See, e.g., Lapierre-Gutt v. Astrue*, 382
 4 F. App'x 662, 664 (9th Cir. Jun. 9, 2010) ("A claimant cannot be discredited for failing to pursue
 5 non-conservative treatment options where none exist.").

6 The ALJ also discounted Plaintiff's cardiac-related allegations because her condition
 7 improved after surgery, but there is no evidence in the record suggests that her condition
 8 improved to a degree that undermined her allegations. The ALJ cited evidence that Plaintiff's
 9 condition improved after surgery to the point that she could walk to the end of her driveway
 10 without shortness of breath, but also noted that she could not push a cart without experiencing
 11 that symptom. AR 30 (citing AR 1020-30). That treatment note described Plaintiff's condition
 12 as improved, but not yet normalized, even with "excellent" treatments for her cardiac conditions.
 13 *See* AR 1030. This treatment note does not contradict Plaintiff's allegations, and the ALJ did not
 14 cite any other objective evidence that Plaintiff improved to a degree that is inconsistent with her
 15 hearing testimony that she can only sit, stand, or walk for about 20 or 30 minutes before needing
 16 to stop and change positions. *See* AR 143-44. None of the activities cited by the ALJ contradict
 17 that testimony, either. *See* AR 34. Although the ALJ states (AR 30) that the RFC assessment
 18 "accounts for [Plaintiff's] alleged chronic pain, cardiac, and fatigue issues," the ALJ in fact
 19 discounted Plaintiff's allegations as to the limiting effects of those issues without providing
 20 legally sufficient reasons and thereby erred.

21 The ALJ also erred in failing to address Plaintiff's testimony regarding her need to use
 22 the bathroom on an urgent basis multiple times per day, due to her irritable bowel syndrome
 23 (IBS). AR 147. Despite the ALJ's finding at step two that Plaintiff's IBS is not severe (AR 18-

1 19), the ALJ was nonetheless required to consider all of Plaintiff's alleged limitations, even those
2 pertaining to conditions that are not severe, when assessing her RFC. *See* 20 C.F.R. §
3 404.1545(e).

4 On remand, the ALJ shall reconsider Plaintiff's physical allegations and either credit
5 them or provide legally sufficient reasons to discount them.

6 **C. The ALJ Did Not Err in Assessing the Medical Opinion Evidence**

7 Plaintiff challenges the ALJ's assessment of opinions written by consultative examiner
8 Lora Van Arsdell, Psy.D., and treating physician Brandy Thomas, M.D. The Court will address
9 each disputed opinion in turn.

10 *I. Legal Standards*

11 Under regulations applicable to this case, the ALJ is required to articulate the
12 persuasiveness of each medical opinion, specifically with respect to whether the opinions are
13 supported and consistent with the record. 20 C.F.R. § 404.1520c(a)-(c). An ALJ's consistency
14 and supportability findings must be supported by substantial evidence. *See Woods v. Kijakazi*,
15 32 F.4th 785, 792 (9th Cir. 2022).

16 *2. Dr. Van Arsdell*

17 Dr. Van Arsdell examined Plaintiff via videoconference in June 2020 and wrote a
18 narrative report describing disabling memory, social, and adaptation limitations. AR 808-12.
19 The ALJ found this opinion unpersuasive because it was inconsistent with Dr. Van Arsdell's
20 largely normal mental status examination findings and appeared to be "based heavily" on
21 Plaintiff's subjective reporting. AR 31. The ALJ also found Dr. Van Arsdell's opinion to be
22 inconsistent with Plaintiff's lack of mental health treatment and denial of symptoms on other
23 occasions. *Id.*

1 The ALJ's supportability finding is reasonable and supported by substantial evidence.
2 Dr. Van Arsdell's mental status examination findings were largely normal and thus fail to
3 support the disabling memory and adaptation deficits that she described. *See* AR 810-11. Dr.
4 Van Arsdell's report documents Plaintiff's self-reported mental limitations at length (AR 811-
5 12), which undermines the objective supportability of the opinion. *See* 20 C.F.R. §
6 404.1520c(c)(1) (explaining that the "supportability" factor addresses the relevance of the
7 objective evidence presented in support of an opinion).

8 Because the ALJ did not err in finding Dr. Van Arsdell's opinion unsupported, he did not
9 err in finding it less persuasive on that basis. Any error in the ALJ's other lines of reasoning is
10 therefore harmless. *See Woods*, 32 F.4th 785, 793 n.4 (9th Cir. 2022).

11 3. *Dr. Thomas*

12 The record contains two exhibits written by Dr. Thomas, Plaintiff's primary care
13 physician, in August 2020. In the first document, Dr. Thomas indicated that Plaintiff's cardiac
14 condition causes symptoms that "seriously limit her ability to independently initiate, sustain or
15 complete activities of daily living due to significant dyspnea." AR 813-14. In a form opinion
16 completed a week later, Dr. Thomas listed a variety of specific, disabling physical limitations.
17 AR 926-30.

18 The ALJ found the first letter unpersuasive because it does not describe any specific
19 functional limitations and is inconsistent with the improvement that Plaintiff experienced after
20 her surgery, which occurred on the same day that Dr. Thomas wrote the first opinion. AR 32.
21 The ALJ found the second opinion unpersuasive because it was written without the benefit of a
22 physical examination and therefore relied on Plaintiff's subjective self-reporting. *Id.* The ALJ
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1 noted that at the time that Dr. Thomas wrote the August 2020 statements, she had not seen
 2 Plaintiff since February 2019⁴ and had not examined her since May 2018. *Id.*

3 The ALJ reasonably found that Dr. Thomas's opinions were unpersuasive. The first
 4 letter does not identify specific functional limitations, which distinguishes it from the regulatory
 5 definition of a medical opinion. *See* 20 C.F.R. § 404.1513(a)(2)-(3). The second opinion is
 6 more specific, and yet suffers from a lack of objective support, given that Dr. Thomas had not
 7 examined Plaintiff for years when she detailed Plaintiff's limitations. Dr. Thomas's
 8 contemporaneous treatment note indicates that she completed the form opinion during a
 9 conversation with Plaintiff (AR 842-43), and Dr. Thomas referred to Plaintiff's reports in the
 10 form (AR 929), which supports the ALJ's finding that the opinion "relies heavily upon the
 11 claimant's subjective complaints." AR 32. The ALJ did not err in finding that the lack of
 12 objective support for the limitations identified in Dr. Thomas's form opinion undermined its
 13 persuasiveness.

14 Because the ALJ did not harmfully err in assessing the challenged medical opinions, the
 15 Court affirms this part of the ALJ's decision.

16 **D. The Appropriate Remedy is a Remand for Further Proceedings**

17 Although Plaintiff requests, in the alternative, a remand for a finding of disability (Dkt. 7
 18 at 18), she has not shown that this extraordinary remedy would be appropriate here. *See Leon v.*
 19 *Berryhill*, 880 F.3d 1044, 1045 (9th Cir. 2017) ("An automatic award of benefits in a disability
 20 benefits case is a rare and prophylactic exception to the well-established ordinary remand rule.").
 21 As explained *supra*, although the ALJ's decision does contain reversible error as to the

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 23 ⁴ Although Plaintiff contends that, contrary to the ALJ's finding, Dr. Thomas "had treatment visits" with Plaintiff a number of times between February 2019 and August 2020, the treatment visits cited by Plaintiff were telephone calls rather than in-person physical examinations performed by Dr. Thomas. *See* Dkt. 13 at 3 (citing AR 460, 477, 492, 842).

1 assessment of Plaintiff's testimony, there are nonetheless conflicts in the opinion evidence as to
2 the extent of Plaintiff's limitations that would preclude a finding of disability at this time. *See*
3 *Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090, 1105 (9th Cir. 2014).

4 Because this case is remanded for further proceedings, Plaintiff will have an opportunity
5 to renew her objection to the ALJ's reliance on State agency medical consultants' opinions,
6 and/or request cross-examination of the consultants under 20 C.F.R. § 404.950(d). The Court
7 need not address Plaintiff's assignment of error pertaining to that issue (Dkt. 7 at 16-17) at this
8 time.

9 **CONCLUSION**

10 For the reasons set forth above, the Commissioner's final decision is **REVERSED** and
11 this case is **REMANDED** for further administrative proceedings under sentence four of 42
12 U.S.C. § 405(g). On remand, the ALJ should reconsider Plaintiff's physical allegations and any
13 other parts of the decision as necessary.

14 Dated this 28th day of July, 2023.

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17 S. KATE VAUGHAN
18 United States Magistrate Judge
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